Essen Foods, Inc. d/b/a Sylvan Street Grille *and* Teamsters Local Union 829, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO. Case 1–CA–27023(1)

July 31, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On October 10, 1990, Administrative Law Judge Marvin Roth issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions, a brief in support, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In reaching his decision the judge found that the Union's ''relevant audience'' consisted of patrons of restaurants or other establishments which purchased and dispensed Kraft products, including the Respondent's customers. He determined that the issue of availability of reasonable alternative means had to be considered on two ''levels'': (1) the availability of alternative means to communicate with the Respondent's patrons, and (2) the availability of means to communicate generally with the customers of firms purchasing Kraft products. He concluded that ''even on the first, or immediate level, the Union had reasonable alternative means to convey its message to the Company's [Respondent's] prospective customers.'' We agree, and thus find it unnecessary to rely on his subsequent analysis regarding the ''second or broader level'' of conveying the message to other customers of firms purchasing Kraft products.

Kathleen G. Mathews, Esq. and *Joseph F. Griffin, Esq.*, for the General Counsel.
Laurence J. Donoghue, Esq., of Boston, Massachusetts, for the Respondent.
Louis A. Guidry, Esq., of Boston, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Boston, Massachusetts, on July 12, 1990.[1] The charge was filed on January 26 by Teamsters Local Union 829, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union). The complaint, which issued on March 9, alleges that Essen Foods, Inc. d/b/a Sylvan Street Grille (the Company or Respondent) violated Section 8(a)(1) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly unlawfully ordered union handbillers to leave its property and cease distributing handbills to company customers in the parking lot of its Peabody, Massachusetts restaurant. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. General Counsel and the Company each filed a brief.

On the entire record in this case and from my observation of the demeanor of the witnesses, and having considered the briefs and arguments of the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, a corporation, maintains an office and place of business and is engaged in the operation of a restaurant known as the Sylvan Street Grille, which is located on the city/town line of Danvers and Peabody, Massachusetts. In the operation of its business, the Company annually derives gross revenues in excess of $500,000 and annually purchases and receives at its restaurant goods valued in excess of $2000 indirectly from points outside of Massachusetts. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The parties stipulated to the following facts: Ernest Tremblay Jr. is the president of Essen Foods, Inc. Christopher Goding is manager of the Sylvan Street Grille. Tremblay and Goding are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act. The Sylvan Street Grille is the sole occupant of a building located on Sylvan Street, on the Peabody-Danvers line. There is one customer entrance to the restaurant. The restaurant entrance is accessible through either a wheelchair ramp, or a set of two stairs. The stairs and ramp both lead to a porch which is 26 feet by 8 feet. The actual doorway is 6 feet wide. The driveway and parking lot for the Sylvan Street Grille are located directly off Sylvan Street. A grassy island is located between Sylvan Street and the restaurant parking lot, on both sides of the restaurant driveway. A portion of each island bordering Sylvan Street is public property.

The parties further stipulated in evidence a 10-year lease agreement executed on January 8, 1990 from Ernest Tremblay Sr. (Tremblay Jr.'s father) to the Company for the premises at 12 Sylvan Street, Peabody, Massachusetts. The

[1] All dates are for the period of September 1, 1989, through August 31, 1990, unless otherwise indicated.

lease provided that the premises were to be used only for the purpose of a restaurant and lounge, and that the lease could not be assigned. The lease further indicated that the leased premises were more fully described in an annexed ''Exhibit 'A'.'' The parties did not stipulate as to any ''Exhibit 'A'.'' Company Attorney Jonathan Blodgett testified that he prepared the lease agreement, that exhibit A was a site plan (introduced in evidence as R. Exh. 2) and that the leased premises included the parking lot and surrounding grounds. The restaurant is located on a tract of land owned by Tremblay Sr., which also includes a motel (Victorian Motor Lodge) and a miniature golf course (closed in winter). The motel fronts on Andover Street (Route 114), which at this point roughly forms sides of a triangle with Sylvan Street, as the two streets approach their intersection. The miniature golf course is located between the motel and the restaurant, with access to Andover Street (whether the motel and golf course have access to Sylvan Street through the restaurant parking lot, is a matter in dispute, which will be discussed). There is no access to the restaurant on either side, as the tract is bounded by other private property. The site plan shows property lines on both sides of the restaurant area (including parking lot), and another line dividing the Tremblay tract from the public property on Sylvan Street, but does not indicate any property line at the rear of the restaurant area. However the site plan legend indicates that the restaurant has parking spaces for 139 cars. General Counsel contends that the Company failed to demonstrate any property interest in the parking lot or surrounding grounds, i.e., in anything other than the restaurant building itself. I do not agree. On the basis of attorney Blodgett's testimony, and the property lines and reference to restaurant parking spaces contained in the site plan, I find that the Company presented prima facie evidence that its lease included the surrounding area. It is unlikely that the Company would lease only the restaurant building without the surrounding area, as this would deprive the Company of any control over access to or from the restaurant building. Moreover, reference to a street address, as in the present lease, normally refers to the entire property, and not simply to the building located at that address. As General Counsel has not rebutted the Company's showing, I find that the Company, since January 8, has had a leasehold interest in the premises at 12 Sylvan Street, including the restaurant building parking lot and surrounding grounds, but not including the motel and miniature golf course.

Since late September 1989, employees of Kraft/S. S. Pierce (Kraft) a food products distributor represented by the Union, have been engaged in an economic strike against that employer. Kraft's principal area facility is located in Peabody. The Kraft Peabody facility normally services some 10,000 accounts throughout eastern New England, including restaurants and other commercial customers. In support of the strike, the Union has handbilled and picketed around Kraft trucks, distributed handbills at restaurants which purchased Kraft products, and placed newspaper advertisements concerning the strike. The handbills which were distributed at restaurants, presented the Union's grievances against Kraft, asking whether readers could ''swallow the food served here'' if they were aware of these grievances. The handbill urged prospective patrons ''to please not swallow the Kraft/S. S. Pierce food served here.'' The handbills did not contain the restaurant's name, and asserted that ''this message is not an appeal to any person to refuse to patronize, pick up, deliver, or transport any goods, or not to perform any services.''

Danny Dostert is a union member and striking Kraft truck driver. He knew the identity of many Kraft customers. Dostert testified in sum as follows: On December 10 he and Kraft striking driver Tom Burns decided to check out the Company's restaurant. They looked in the dumpster and saw a Kraft container with an invoice sticker dated January 9, which indicated that the Company purchased Kraft products. At about 12:30 p.m. they commenced distributing handbills. Each stood at the foot of a set of stairs, to one side, and they did not block access. Dostert stood by the stairway nearest to the parking lot. Two men came out the front door. The first man, who wore a chef-type jacket, told them to get the hell out of there. Dostert refused, saying they had a right to be there. Dostert explained they were handbilling because the Company was buying from Kraft. (Dostert did not see either man in the hearing room). About 20 minutes later the two men came out again. The first man said he was the manager, and would speak to the owner and see what he could do for them. Some 15 to 20 minutes later the ''manager'' came out again. He asked about the strike, and said that the handbillers should go out to the road. Dostert replied that it was dangerous because of heavy traffic, and they would miss the people. On either the second or third occasion a third man wearing a business suit came out of the restaurant. (Dostert initially testified that he did not see the man in the hearing room, but subsequently indicated that he might be Company Attorney Robert Morris.) The man said they should handbill on the sidewalk. Dostert answered that there was no sidewalk. Dostert and Burns remained at the restaurant entrance for about 2 hours. At about 5:30 p.m. Dostert returned to handbill with his 14-year-old son. By this time it was dark. The second man came out and said they were trespassing and had to leave. Police arrived, and told Dostert the same thing. Dostert said he understood they had a legal right to be there. The police said he would have to take it up with the Union, which could discuss the matter with the police chief. The police did not suggest alternative handbilling locations. Dostert and his son left, and the union handbillers did not return. They did not handbill at the entrance to the parking lot because it was too dangerous, cars might not stop, and some customers might enter through the rear, i.e., from Andover Street through the motel area. However so far as Dostert could see, all customers came by car and entered from Sylvan Street. Dostert did not testify, nor was other evidence presented which would indicate that the parking lot was commonly used by persons other than restaurant patrons. Dostert handbilled at some 100 facilities over a 6- to 8-week period, but was stopped on only 2 other occasions (one of which was resolved).

Company Shift Manager Christopher Goding and Attorney Blodgett were present at the hearing and presented as witnesses. Goding's testimony substantially consisted of identification of his affidavit to the Board's Regional Office, which General Counsel presented in evidence. General Counsel also presented Blodgett's affidavit in evidence. Dostert, Blodgett and Goding were the only witnesses in this proceeding. Blodgett testified (including his affidavit), in sum as follows: On January 10 at about 12:30 p.m. he was at the restaurant for lunch. Two handbillers were standing at the

foot of and alongside a stairway. One came onto the stairs when Blodgett approached. Blodgett came out, identified himself as the Company's attorney, and told the handbillers this was private property, there was a no solicitation rule, and they should move to a different area of the parking lot. Blodgett pointed to a curb cut in the ''sidewalk,'' specifically, an area within the parking lot, next to the grassy island, on the driveway side farthest from the restaurant building, about 50 to 100 feet from the restaurant door. However there were so many curb cuts that Blodgett could not say there was actually a sidewalk. Manager Goding also spoke to the handbillers, but President Tremblay said he did not. There is a restaurant sign which indicates parking for guests only, and a window sign which prohibits solicitation. There is no special pedestrian entrance to the restaurant. However some patrons may park elsewhere and walk to the restaurant (through the parking lot), particularly if the restaurant lot is full. There is a chain link fence which separates the restaurant premises from the motel parking lot. There is a break in the fence. Barrels were placed in the break. However it is possible for cars to drive through the break.

Manager Goding, in his affidavit, stated in sum as follows: On January 10 during the lunch period, two men distributed handbills at the restaurant. They stood at the foot of and to one side of a stairway, although one later moved to the foot of the wheelchair ramp. They did not block access. Acting on instructions from president Tremblay, Goding told them they were on private property and asked them to leave. They refused, saying they had a legal right to be there. This was Goding's only conversation with the handbillers. Tremblay instructed Goding to call the police, which he did. Handbillers were present on two other occasions at the restaurant, including the following day. There is a sidewalk along Sylvan Street, broken only by curb cuts into the restaurant parking lot.

I find that Dostert's testimony substantially reflects what transpired at the restaurant on January 10, but with some qualifications. Dostert was the only witness to give a complete narrative of the day's events, although he plainly did not have a clear recollection of the persons to whom he spoke. Dostert initially spoke to manager Goding, who told the handbillers to leave. However after consultation between Tremblay and his attorney, Blodgett came out and suggested that they could handbill elsewhere, pointing to the area (as testified by Blodgett) which he erroneously described as sidewalk. In fact there is no sidewalk adjacent to the restaurant premises. Rather, as indicated by the stipulation of facts and site plan, the restaurant premises are bounded on Sylvan Street by two grassy areas and curb cuts which can be used as driveways into and out of the restaurant premises. Dostert and Burns did not handbill on the steps or otherwise block access to the restaurant. Indeed no witness claimed that they engaged in such activity. Rather they handbilled at the foot of and to the side of the steps. When they persisted in handbilling at this location, the Company summoned the local police. Dostert and his son returned later that day, whereupon the police, probably accompanied by Tremblay, told them to leave, which they did. I credit Dostert's testimony that he did not return to the restaurant. If anyone did handbill thereafter, it was probably another person.

B. *Analysis and Concluding Findings*

The starting point for analysis is *Jean Country*, 291 NLRB 11 (1988), which sets forth the tests for nonemployee access cases. The Company argues that the *Jean Country* analysis is flawed and contrary to Supreme Court precedent, because it takes into consideration the relative strength of the property and Section 7 rights asserted respectively by the employer and labor organization involved. The Company recognizes that I am bound by Board precedent, but wishes to preserve its position. Moreover, the Company's position is erroneous. See the Board's discussion and analysis of applicable Supreme Court decisions in *Fairmont Hotel*, 282 NLRB 139, 140–141 (1986). These decisions, specifically *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), *Hudgens v. NLRB*, 424 U.S. 507 (1976), and *Sears, Roebuck & Co. v. San Diego County Council of Carpenters*, 436 U.S. 180 (1978), make clear that the relative strengths of the property and Section 7 rights are appropriate factors for consideration in resolving these access cases. See also *Lechmere, Inc.*, 295 NLRB 92 (1989), enfd. 914 F.2d 313 (1st Cir. 1990).

Under *Jean Country*, three factors must be considered: (1) the strength of the property interest asserted by the employer; (2) the strength of the Section 7 right invoked by the union; and (3) the availability of reasonable alternative means for the Union to communicate its message to a relevant audience, other than the means prohibited by the employer. The first two factors present little difficulty when applied to the evidence in this case, because the Board has assessed these factors in comparable situations. A leasehold interest, as here, is a legitimate property interest for purposes of the analysis. *Jean Country*, supra; *Red Food Stores*, 296 NLRB 450 (1989). The Company's asserted property interest is comparable to that invoked by employees in *Federated Department Stores*, 293 NLRB 408 (1989); and *Mountain Country Food Store*, 292 NLRB 967 (1989). In *Federated Department Stores*, the Board found as follows:

> In this case, each of the Respondent's two stores is a freestanding structure owned by the Respondent and situated by itself on its own parking lot provided for its own customers. At all relevant times, neither store shared its sidewalk, parking lot, or access roads with the customers of any other merchant. There is no evidence that the Respondent invited the public onto the premises of either of the two stores for any purpose other than to purchase goods from the stores. On the other hand, the Respondent's stores are retail operations generally open to the public without overt restriction. Under these circumstances, we find that the Respondent was asserting a substantial private property interest when it prevented nonemployees from handbilling on its property.

In *Federated Department Stores*, the respondent was the owner rather than the lessee of the property. In the other respects described by the Board, the facts were comparable to the present case. However in *Mountain Country*, which also involved a comparable situation, i.e., freestanding retail facilities, with their own parking lots, the respondent had leasehold rather than ownership interest. The Board held that the respondent's property interest was ''relatively substantial.'' There is another factor which tends to strengthen the prop-

erty interest here invoked. The Company did not exclude the Union from all of its leasehold property. Rather it prohibited handbilling only at the immediate entrance to the restaurant building, i.e., the immediate locus of its business operation. I find on the authority of *Federated Department Stores* and *Mountain Country Food Store*, that the Company asserted a substantial private property interest.

The second *Jean Country* factor is also governed by *Mountain Country*. The Board held:

> With respect to the Union's activities, we agree with the judge that the Union's handbilling, which is in support of its primary economic dispute with the bottling company, is clearly protected by Section 7. The type of ''struck product'' consumer handbilling engaged in by the Union here was recognized as being protected activity by the Supreme Court in its 1964 *Tree Fruits* decision (*NLRB v. Fruit Packers Local 760*, 377 U.S. 58). Accordingly, we find that the right asserted here is a relatively strong Section 7 right. Further, as the judge found, there is no evidence that the handbillers interfered significantly with ingress or egress at any of the four stores, and the number of handbillers at each store was reasonable. The handbilling was peaceful; no employees or customers were harassed, and deliveries were not obstructed. Thus, the manner in which the Union engaged in its conduct does not diminish the strength of the Section 7 right. Under the circumstances, we find that the Union's Section 7 right involved here is certainly worthy of protection against substantial impairment.

In the present case, the Company does not dispute that the Union engaged in consumer handbilling recognized as protected activity under uTree Fruits. On the authority of *Mountain Country*, I find that the Union here asserted ''a relatively strong Section 7 right.''

In sum, the Company here invoked a relatively substantial property interest, and the Union asserted a relatively strong Section 7 right. Therefore neither factor outweighs the other or tilts the balance in favor of the Company or the Union. This leaves the third and decisive factor, namely, the availability of reasonable alternative means of communication to the relevant audience. Put another way the ultimate question is whether the Company's conduct substantially impaired the Union's Section 7 rights. *Mountain Country*. Here, the relevant audience consisted of the patrons of restaurants or other establishments which purchase and dispense Kraft products, including the Company's customers. Therefore the question of alternative means must be considered on two levels: The availability of alternative means to communicate with the Company's patrons, and the availability of means to communicate generally with the customers of firms purchasing Kraft products. Some factors to be considered are set forth in *Lechmere*, supra. ''A claim that the Union's intended audience consists of customers of *every* establishment that has even a remote connection to [the primary] target employer will not necessarily warrant access to any and all sites at which such customers may be found, even if access to private property might be necessary to reach customers at one such site.'' *Hardee's Food Systems*, 294 NLRB 642 (1989), affd. sub nom. *Laborers Local 204 v. NLRB*, 904 F.2d 715 (D.C. Cir. 1990), citing *Jean Country*.

Applying the Board's standards to the present case, I find that even on the first, or immediate level, the Union had reasonable alternative means to convey its message to the Company's prospective customers. The Company did not exclude the Union from its entire premises. Rather the Company offered an alternative which permitted the Union to distribute its handbills on the Company's own property, at the driveway entrances to its parking lot. The Company did not force the handbillers to go on or adjacent to the public roadway. Attorney Blodgett did not direct the handbillers to a dangerous location. Rather he directed them to an area where vehicles would be proceeding slowly as they entered the parking lot, looking for parking spaces, and where patrons would be walking toward the restaurant. For these reasons also, the Union would have reasonable opportunity to offer patrons its literature. As discussed, the evidence indicates that few if any patrons entered the restaurant premises through the rear, i.e., by approaching through the rear of the motel premises. The location designated by Blodgett would be less effective than a direct confrontation at the stairway entrance. However the Act, as interpreted by the Supreme Court and the Board, ''acknowledges the need for reasonable means of communication, not the most effective means.'' *Hardee's Food Systems*. Compare *Red Food Stores*, supra, in which the Board found that area standards handbilling at the ''perimeters'' of two retail stores, specifically, grassy areas separating the parking lots from adjoining thoroughfares, coupled with a media campaign constituted ''a reasonable, effective alternative to entry onto the [store] property.'' In the present case, the Company offered a better alternative, namely, handbilling within its property and on its own parking lot. In the present case, unlike *Red Food*, the Union did not even bother to make use of this alternative. The Union's response in ignoring the Company's invitation, also tends to indicate that on the second or broader level, the Union had reasonable alternative means of conveying its message. As found, the Union distributed handbills at numerous establishments doing business with Kraft, but was stopped on only a few occasions. In sum, the handbilling at the Company's restaurant constituted only a small part of the Union's campaign (which also included use of the media). I find that the Union had reasonable alternative means for conveying its message to the relevant audience, and that the Company did not substantially impair the Union's Section 7 rights by prohibiting handbilling in the area of the entrance to the restaurant building. Therefore the Company did not violate the Act.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company did not violate Section 8(a)(1) of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.